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ABSTRACT

In order to assess the quality of justice available to Native Americans in Burleigh County, North Dakota, investigations were conducted from June 1976 through April 1978 with an informal fact finding meeting as well as interviews with approximately 85 persons in Burleigh County and throughout the state. The 1970 census lists Native Americans living in North Dakota as comprising 2.3 percent of the population, yet the inmate structure of the North Dakota State Penitentiary includes 25 to 30 percent Indians. In Burleigh County during 1977, 32.7 percent of the arrests made for the eight most common offenses were of Indians, although the 1970 census showed Indians comprised only 1 percent of the total county population. The disproportionate number of Native Americans arrested and incarcerated is due to a number of factors. Indian unemployment exceeds 35 percent; this affects community attitudes of prejudice and discrimination. Such attitudes in turn often influence law enforcement officers, court officials, attorneys, and jury panels. Communication between Indian clients and their attorneys or courts is often a problem. Only rarely is an Indian person called for jury duty and it is difficult to get an impartial jury for an Indian defendant. Among the recommendations for improving the justice system for Native Americans in North Dakota are recruiting more Indian enforcement officers, providing ombudsmen versed in judicial procedures to assist Indian defendants, establishing a statewide public defender system, and broadening the jury selection system to include a representative proportion of Native Americans on each jury panel. (DS)

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Native American Justice Issues in North Dakota

August 1978

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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Native American Justice Issues in North Dakota

—A report prepared by the North Dakota Advisory Committee to the U.S. Commission on Civil Rights

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LETTER OF TRANSMITTAL

The North Dakota Advisory Committee
to the United States
Commission on Civil Rights
August 1978

MEMBERS OF THE COMMISSION
Arthur S. Flemming, *Chairman*
Stephen Horn, *Vice Chairman*
Frankie Freeman
Manuel Ruiz, Jr.
Murray Saltzman
Louis Nuñez, *Acting Staff Director*

Dear People:

The North Dakota Advisory Committee, pursuant to its responsibility to advise the Commission on civil rights problems in the State, submits this report on criminal justice for Native Americans. Through its investigation, the Advisory Committee concludes that, even though there has been progress in the quality of justice for all persons in the State, Indian people face problems which place them at a severe disadvantage in the criminal justice system.

The study assesses the quality of justice available to Native Americans in Burleigh County, North Dakota. Issues investigated were confined to criminal justice involving State, county, and municipal law agencies and courts. Members of the North Dakota Advisory Committee and staff of the Commission's Rocky Mountain Regional Office conducted investigations from June 1976 through April 1978, interviewing approximately 85 persons in Burleigh County and throughout the State. Those persons included State officials, law enforcement officers, defense and prosecuting attorneys, court administrators, community organization representatives, and other interested persons. On December 9, 1976, the North Dakota Advisory Committee conducted an informal factfinding meeting in Bismarck at which 18 persons testified and were questioned by Advisory Committee members and Rocky Mountain Regional Office staff.

The study found evidence of underrepresentation of American Indians on the staffs of both the Burleigh County Sheriff's Office and the Bismarck City Police Department. The North Dakota Combined Law Enforcement Council fails to comply with the Law Enforcement Assistance Administration guidelines stating the agency's responsibility for monitoring equal employment opportunity programs in grant-receiving agencies.

The Advisory Committee found that there are no statewide uniform standards for entrance into police employment in North Dakota. The problem of communication between Native Americans and North Dakota law enforcement officers, attorneys, and court officials, which places Indians at a disadvantage in obtaining justice, is largely due to a lack of cultural understanding between white and Indian people.

It was further found by the Committee that the court-appointed defense attorney system in North Dakota places indigent defendants at a serious disadvantage. The extremely high number of guilty pleas involving indigent defendants, a large proportion of whom are Native Americans, raises serious question about adequate protection of indigent defendants.

The bail system also works to the disadvantage of indigent defendants; cash bail and the requirement of property for surety often work special hardships on Native Americans who may

be poor and without property. Finally, prevailing community attitudes and the fact that it is extremely rare for a Native American to serve on a jury in North Dakota make it difficult for Native Americans in the State to obtain a fair trial.

The North Dakota Advisory Committee made a total of 14 recommendations that are addressed to the courts, the legislature, and State and local agencies requesting actions necessary to alleviate disparities in the criminal justice system.

We urge you to consider this report and make public your reaction to it.

Respectfully,

Harriett Skye
Chairperson

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THE UNITED STATES COMMISSION ON CIVIL RIGHTS

The United States Commission on Civil Rights, created by the Civil Rights Act of 1957, is an independent, bipartisan agency of the executive branch of the Federal Government. By the terms of the act, as amended, the Commission is charged with the following duties pertaining to denials of the equal protection of the laws based on race, color, sex, religion, or national origin, or in the administration of justice: investigation of individual discriminatory denials of the right to vote; study of legal developments with respect to denials of equal protection of the law; appraisal of the laws and policies of the United States with respect to denials of equal protection of the law; maintenance of a national clearinghouse for information respecting denials of equal protection of the law; and investigation of patterns or practices of fraud or discrimination in the conduct of Federal elections. The Commission is also required to submit reports to the President and the Congress at such times as the Commission, the Congress, or the President shall deem desirable.

THE STATE ADVISORY COMMITTEES

An Advisory Committee to the United States Commission on Civil Rights has been established in each of the 50 States and the District of Columbia pursuant to section 105(c) of the Civil Rights Act of 1957 as amended. The Advisory Committees are made up of responsible persons who serve without compensation. Their functions under their mandate from the Commission are to: advise the Commission of all relevant information concerning their respective State on matters within the jurisdiction of the Commission; advise the Commission on matters of mutual concern in the preparation of reports of the Commission to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public and private organizations, and public officials upon matters pertinent to inquiries conducted by the State Advisory Committee; initiate and forward advice and recommendations to the Commission upon matters in which the Commission shall request the assistance of the State Advisory Committee; and attend, as observers, any open hearing or conference which the Commission may hold within the State.

ACKNOWLEDGMENTS

The North Dakota Advisory Committee wishes to thank the staff of the Commission's Rocky Mountain Regional Office, Denver, Colorado, for its help in the preparation of this report.

The investigation and report were the principal staff assignment of William F. Muldrow, with assistance from William Levis, Rebecca Marrujo, Cal E. Rollins, and Thelma J. Stiffarm; and support from Esther Johnson, Cathie Davis, and Linda Stahnke. The project was undertaken under the overall supervision of Dr. Shirley Hill Witt, director, Rocky Mountain Regional Office.

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Those of us who are privileged to represent the citizens of North Dakota also assume a deep responsibility to administer the laws, the rules and regulations that are set down by an organized society, and in the truest traditions of this country of ours, [to] administer those rules and regulations with fairness [and] equity to the advantage of all of our citizens.

Arthur Link, Governor of North Dakota, at the North Dakota Advisory Committee public factfinding meeting in Bismarck, North Dakota, December 9, 1976

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Preface

In the fall of 1975, the North and South Dakota Advisory Committees to the United States Commission on Civil Rights met jointly in Aberdeen, South Dakota, to discuss civil rights issues in the two States. The major civil rights concern of the two groups was the quality of criminal justice available to Native Americans and the equality of treatment they received under the law.

This concern that led the Committees to undertake the present study arose from a variety of sources. Several Native American members of the Committees related personal experiences with law enforcement agencies and courts in which they felt that they had been treated unjustly. Statistical information and findings of recent reports issued by public and private agencies point up special problems faced by Native Americans in the criminal justice systems of both Dakotas.[1] Reports by other State Advisory Committees to the U.S. Commission on Civil Rights have also documented problems of prejudice and unequal treatment encountered by Native Americans in the criminal justice system in other parts of the country.[2] The Congressional Liaison Unit of the Commission has received more inquiries from across the Nation about alleged mistreatment of Native Americans by law enforcement agencies and judicial and correctional systems than about any other single issue.

In North Dakota there is neither a State civil rights statute nor a State civil rights agency to investigate citizens' complaints of the denial of equal protection under the law in the administration of justice. That discrimination against Indian persons exists in the Bismarck-Mandan community, western North Dakota's largest urban area, in the judicial system, as well as in the areas of housing and employment, has been attested by citizens of that area.[3]

The present study assesses the quality of justice available to Native Americans in Burleigh County, North Dakota. This county is adjacent to the Standing Rock Sioux Indian Reservation and contains Bismarck, the State capital. Issues investigated were confined to criminal justice involving State, county, and municipal law enforcement agencies and courts. Cases and incidents under Federal and tribal jurisdiction were not included because they were outside the scope of the project.

Members of the North Dakota Advisory Committee and staff of the Commission's Rocky Mountain Regional Office conducted investigations from June 1976 through April 1978, interviewing approximately 85 persons in Burleigh County and throughout the State. Those persons included State officials, law enforcement officers, defense and prosecuting attorneys, court administrators, community organization representatives, and other interested persons.

Statistical data and other pertinent information were gathered as background material for the study and have been updated for the present report. On December 9, 1976, the North Dakota Advisory Committee conducted an informal fact-finding meeting in Bismarck at which 18 persons testified and were questioned by Advisory Committee members and Rocky Mountain Regional Office staff.

Notes to Preface

1. John Howard Association, *Corrections in South Dakota* (Chicago, Ill.: August 1975); John M. Parr and H. Jeffrey Peterson, *Prisoners' Civil Rights in North Dakota* (Institute for the Study of Crime and Delinquency, Bureau of Governmental Affairs, University of North Dakota: August 1973); Edward L. Morgan, "Law and Order" (unpublished report to the Bureau of Indian Affairs and the Community Relations Service of the U.S. Department of Justice, June 1974); South Dakota Division of Law Enforcement Assistance, *Criminal Justice in South Dakota: A Plan for Action* (Pierre, S. Dak.: 1975 and 1976); U.S., Department of Justice, Federal Bureau of Investigation, *Crime in the United States 1975: Uniform Crime Reports* (1976); North Dakota State Planning Division, *North Dakota Comprehensive Plan* (Bismark, N. Dak.: 1976); the *1975 and 1976 Reports of the South Dakota Task Force on Indian-State Government Relations*; National Center for Defense Management, *Systems Development Study of Indigent Defense Delivery Systems for the State of South Dakota* (Washington, D.C.: 1977).

2. New Mexico Advisory Committee to the U.S. Commission on Civil Rights, *The Farmington Report: A Conflict of Cultures* 1975; Arizona Advisory Committee to the U.S. Commission on Civil Rights, *Justice in Flagstaff: Are These Rights Inalienable?* (1977); Montana, North Dakota, and South Dakota Advisory Committees to the U.S. Commission on Civil Rights, *Indian Civil Rights Issues in Montana, North Dakota, and South Dakota* (1974); South Dakota Advisory Committee to the U.S. Commission on Civil Rights, *Liberty and Justice for All* (1977).

3. "Discrimination: Affidavits Force to Light Bismarck's Dark Side," *United Tribes News*, Oct. 31, 1975, p. 1.

1. Introduction

Legal Considerations

The United States Constitution, Federal statutes, and various State laws protect the rights of all persons, including Native Americans who, since 1924, have been citizens of the United States and of the State in which they reside. Under the Constitution certain rights are inalienable:

- No person may be deprived of life, liberty, or property without due process of law;
- Except under limited circumstances, police cannot make arrests or search persons and their property without a warrant;
- All persons have the right to be represented by an attorney in all State and Federal criminal proceedings in which incarceration is possible and the right to remain silent when questioned by law enforcement officials;
- Except for persons charged with crimes punishable by death or life imprisonment, all defendants have the right to bail, which shall not exceed the amount necessary to ensure that the defendant will return for trial;
- No persons can be forced to testify against themselves;
- Persons arrested must be informed of the charges and of their constitutional rights and be given the opportunity to plead guilty or not guilty;
- Defendants have the right to speedy and public trials by a jury of their peers; and
- State and Federal governments are prohibited from denying any person "equal protection of the law."

North Dakota has drafted rules of criminal procedure to protect these rights.[1] These rules apply to all criminal proceedings and have the force and effect of law.[2]

A person who is arrested by a peace officer, with or without a warrant, must be brought before a magistrate "without unnecessary delay" or be released from custody.[3] At the time of arrest suspects must be informed of their rights by the arresting officer as well as by the magistrate at the initial appearance.[4] A defendant must be released on personal recognizance on execution of an unsecured appearance bond pending trial, unless the magistrate determines at the initial appearance that release without bail will not reasonably ensure the presence of the defendant at further proceedings.[5]

Vital Statistics and Socioeconomic Characteristics

Native Americans living in North Dakota are by far the largest minority group in the State. The 1970 census showed a Native American population of 14,369 (7,054 male and 7,315 female), comprising 2.3 percent of the State's total population (617,761).[6] The same census showed Native Americans numbering 428 in Burleigh County, comprising 1 percent of the total county population (40,714).[7] These statistics for Indians in North Dakota are undoubtedly low. Art Raymond, a Native American and director of the Indian studies program at the University of North Dakota in Grand Forks, estimates that 30,000, nearly twice the Bureau of Census count, would be a much more accurate figure for the number of Indians in the State.[8] Conservatively, 7,000 Native Americans reside off the reservation.[9]

A census conducted by the Dakota Association of Native Americans (DANA) in 1976 found 4,090 Indians living in the State's five largest cities (Bismarck, Grand Forks, Fargo, Minot, and Williston), while the 1970 national census counted only 1,159.[10] In the Bismarck area, off-reservation Indians numbered 1,058.[11] This amounts to 2.5 percent of the county population. The high percentage of Native Americans in the Bismarck area may be attributed to the fact that the United Tribes Educational Technical Center (a vocational school for Native Americans) is located there.

In 1975, 6,383 or 7 percent of the State's poverty population was Native American. These figures considered the poverty level for a one-person household to be $1,840 per year, $2,364 for a

TABLE 1
Burleigh County Sheriff's Office Arrest Statistics for 1977

Crimes and Arrests	Non-Indian	Indian	Total
Murder	1 (100%)	0 (0.0%)	1 (100%)
Rape	0	0	0
Robbery	3 (42.9)	4 (57.1)	7 (100)
Assault	11 (57.9)	8 (42.1)	19 (100)
Burglary	18 (81.8)	4 (18.2)	22 (100)
Larceny	25 (61.0)	16 (39.0)	41 (100)
Theft	44 (73.3)	16 (26.7)	60 (100)
Auto theft	8 (66.7)	4 (33.3)	12 (100)
Totals	109	53	162

Source: Information provided by Burleigh County Sheriff Bob Harvey to Rocky Mountain Regional Office staff, Dec. 16, 1977.

TABLE 2
Bismarck City Police Department Arrest Statistics for 1975

Crimes and Arrests	Non-Indian	Indian	Total
Burglary	32 (82.0%)	7 (18.0%)	39 (100%)
Larceny	373 (86.7)	52 (12.1)	425 (100)
Other assaults	17 (77.3)	5 (22.7)	22 (100)
Vandalism	35 (94.6)	2 (5.4)	37 (100)
Narcotic drug laws	103 (100.0)	0 (0.0)	103 (100)
Driving under the influence	215 (93.5)	15 (6.5)	230 (100)
Liquor laws	252 (85.7)	42 (14.3)	294 (100)
Disorderly conduct	58 (61.7)	35 (37.3)	93 (100)
Totals	1,085	158	1,243

Source: Information provided by Erwin Weisenburger, Personnel Department, City of Bismarck, North Dakota, to Rocky Mountain Regional Office staff, Oct. 13, 1976.

two-person household, and $3,721 for an average family of four.[12] At the Advisory Committee's fact-finding meeting in Bismarck, Art Raymond testified that, in 1970, 49 percent of the Native American families in North Dakota had an income below the national poverty level and that the median income of Indian families in the State was $2,827. (p.16)[13]

Incarceration and Arrest Statistics

Governor Arthur Link testified to the Advisory Committee that, although the Native American population of North Dakota is less than 3 percent of the entire State, the inmate structure of the North Dakota State Penitentiary includes 25 to 30 percent Indian persons on a continuing basis—nearly 10 times their proportion in the general population. (p. 10) On December 20, 1977, the total inmate population of the North Dakota State Penitentiary was 275 of whom 49, or 17 percent, were Indians.[14] The Governor commented:

> When we look at the State's population and compare the [total] prison population of Indian people with [their proportion in] the total State population of less than 3 percent, it is apparent that something is wrong and that constructive action is needed. (p. 10)

Available statistics also show that in Burleigh County the number of arrests of Native Americans far exceeds their proportion in the population. Table 1 shows that in fiscal year 1977, 32.7 percent of the arrests made by the sheriff's office for the eight most common offenses (excluding persons taken into protective custody under the North Dakota detoxification law) were Indians. As indicated in table 2, 12.6 percent of the arrests made by the Bismarck city police department in 1975 for the eight most common offenses were of Native Americans. Comparative statistics from the North Dakota Highway Patrol were unavailable because the patrol does not classify arrests according to race.

This study does not purport to identify all the possible factors that result in the disproportionate number of Native Americans who are arrested and incarcerated in North Dakota. Instead, it reviews factors operating in society and in the criminal justice system of the State that the North Dakota Advisory Committee feels adversely affect Indian people.

Community Attitudes

Community attitudes toward Native Americans may very well underlie many of the problems Indians face in the criminal justice system. Law enforcement officers, court officials, defense and prosecuting attorneys, as well as jury panels, are members of the community and are usually selected to serve by the community. Doubtless many persons who serve in these official capacities are able to divorce themselves from prevailing feelings and attitudes that are detrimental to the objective performance of their duties. However, they are nonetheless subject to political and social pressures arising from the environment in which they find themselves.

A number of persons who were interviewed during the Advisory Committee's public meeting in Bismarck and during the field investigation expressed opinions about the degree of prejudice against Indian persons in North Dakota. Allen Olson, State attorney general, stated that some persons have strong prejudice and that the term "drunken Indian" was an all too often used generalization.[15] Ralph LePera, legal counsel for the United Tribes Educational Technical Center, feels that prejudice in the State is a subtle thing, with indirect manifestations resulting from lack of understanding of Indian culture or any desire to understand it.[16]

Louis Plante, a Native American and project director for the Indian Center in Bismarck, was emphatic that the general attitude of the Bismarck community toward Native Americans is: "not only one of prejudice, it's outright discrimination in many cases, and I personally have experienced discrimination ... outright discrimination, even in housing." (p.24)

Alfred A. Thompson, judge of the Fourth Judicial District, stated that his experience leads him to believe that community attitudes have improved considerably over the years, though a hard core of prejudice remains. He testified at the Advisory Committee's public meeting:

> ...[T]here was a time when a person of American Indian blood would find it very difficult to get bail under any circumstances. I saw the day with my own two eyes, saw a law enforce-

TABLE 3
Employment by North Dakota State Agencies as of June 30, 1977

Salary range	Total	Native American		White		Other nonwhite	
		No.	% of total	No.	% of total	No.	% of total
$1,000– 3,900	75	1	1.3	74	98.7	0	0.0
4,000– 5,900	881	9	1.0	865	98.2	7	0.8
6,000– 7,900	2,002	113	5.6	1,880	93.9	9	0.4
8,000– 9,900	1,338	26	1.9	1,304	97.5	8	0.6
10,000–12,900	1,566	16	1.0	1,547	98.8	3	0.2
13,000–15,900	942	7	0.7	929	98.6	6	0.6
16,000–24,000	1,054	7	0.7	1,040	98.7	7	0.7
25,000 and over	160	1	0.6	144	90.0	15	9.4
Totals	8,018	180	2.2	7,783	97.1	55	0.7

Source: North Dakota Indian Affairs Commission, *Survey of State Agency Employment.* Employment data as of June 30, 1977. In a letter to Dr. Shirley Hill Witt dated May 9, 1978, Juanita Helphrey explained that this survey included only 76 out of almost 200 State agencies. Most of those contacted were in Bismarck.

> ment officer run a man out of town with a .45 caliber weapon, shooting it in the air and at the ground.
>
> Now, those days have passed,...we've come a long way. [But] I think there are people in the community and there are classes in the community who feel that nonwhites are no good.... That's disappearing to a certain extent, but there's also a hard core. As I have observed in my experience here,...[there are those in] this community who feel that we're wasting time with some people who come before the courts, some nonwhites. (pp. 202–03)

Indian employment conditions in North Dakota also may reflect underlying attitudes of the general population. A regional manpower survey in 1976 showed that, statewide, Indians are the group with the highest rate of unemployment, exceeding 35 percent in many cases.[17] Juanita Helphrey, executive director of the North Dakota Indian Affairs Commission, stated that research done by that organization in 1971 shows that out of approximately 8,000 State employees less than 100 were Indians and there were fewer than 10 employed in the State Capitol itself. (pp. 35–36) In 1977, as shown in table 3, the number of Indians working for the State had increased to 180 (2.2 percent) out of a total of 8,018 employees. However, 82.8 percent of the Indians employed were in positions paying less than $9,900 per year. This compared with 53.0 percent of the total whites employed by the State within those same pay scale categories.

Gary Cardiff, civil rights officer for the State department of social services, pointed out that North Dakota is one of two States (the other is Alabama) that do not have some form of human or civil rights statute. A human rights bill, similar to SB 2424 which was debated in the State Senate in 1977, is currently before the Joint Study Resolution Committee on Social Welfare. If passed, this would prohibit discrimination on the basis of race, color, national origin, age, religion, sex, handicap, or marital status. Cardiff is less than optimistic about chances for its enactment during the 1979 legislative session.[18]

Notes to Chapter 1

1. North Dakota Century Code (N.D. Cent. Code) §27-02-08.

2. Rule 1, North Dakota Rules of Criminal Procedures (N.D.R.Crim.P.).

3. Rule 5a, N.D.R.Crim.P.

4. Rule 5b, N.D.R.Crim.P.

5. Rule 46(a)(1), N.D.R.Crim.P.

6. U.S., Department of Commerce, Bureau of the Census, 1970 Census of the Population, *General Population Characteristics*, North Dakota, PC(1)–B36 (1971), table 17 (hereafter cited as *General Population Characteristics*).

7. Ibid.

8. Interview with RMRO staff at the Rocky Mountain Regional Advisory Committee Conference in Estes Park, Colo., Mar. 21, 1978.

9. Dakota Association of Native Americans, "North Dakota Off-Reservation Indian Legal Services Project," Jan. 21, 1976 (an unpublished project proposal).

10. "Indian Census Ends," *Bismarck Tribune*, July 3, 1976.

11. Dakota Association of Native Americans, *North Dakota Off-Reservation Indian Census* (1976), p. 11.

12. Information supplied to Rocky Mountain Regional Office staff by David Waldron, director, Area Low Income Council (Ramsey County Community Action Program), May 26, 1976.

13. Page numbers in parentheses cited here and hereafter in the text refer to statements made to the North Dakota Advisory Committee at its factfinding meeting in Bismarck, North Dakota, on Dec. 9, 1976.

14. Cathy Jensen, legal records clerk, North Dakota Penitentiary, letter to Thelma Stiffarm, RMRO, Dec. 20, 1977.

15. Rocky Mountain Regional Office staff interview in Bismarck, July 14, 1976.

16. Rocky Mountain Regional Office staff interviews in Bismarck, May 24, and Oct. 26, 1976.

17. "Survey Finds High Indian Unemployment," *United Tribes News*, May-June 1976, p. 1.

18. Telephone interview with Rocky Mountain Regional Office staff, Mar. 29, 1978. See also Gary Cardiff, letter to Dr. Shirley Hill Witt, Apr. 28, 1978.

2. Native Americans and the Law Enforcement System

Law Enforcement Agencies

The law enforcement system in North Dakota is a network of State, county, and municipal agencies which are independently organized but which work together in various ways. In Burleigh County these include the North Dakota Highway Patrol (NDHP), the Burleigh County Sheriff's Office, the Bismarck City Police Department, and the North Dakota Bureau of Criminal Investigation (BCI).

The NDHP has primary responsibility for enforcing laws of the State relating to the use of highways, as well as for administering driver's license examinations, securing State property, and exercising general powers over all violations of the law on highways and their right of way.[1] This jurisdiction also extends to State highways on Indian reservations.[2] Major Orlin C. Benson, Sr., operations officer, explained that the NDHP has concurrent jurisdiction with the sheriff's department on the highways within the county and, in his view, a good working relationship with the Bureau of Indian Affairs on the highways within the confines of the reservation.[3] The highway patrol also administers the North Dakota Law Enforcement Training Center and develops curriculum for each training cycle.[4]

The NDHP has primary responsibility for recruiting its own personnel. Major Benson stated that the authorized strength of the NDHP is 95 patrol officers, making it the smallest such organization in the United States. (p. 216) A 1977 report for the NDHP by the Marquette University Center for Criminal Justice Agency Organization and Minority Employment Opportunities found that in that year 5 patrol officers out of the total 95 were Native American. One was a captain and two had been employed for more than 20 years. The other Indian officers had served 16, 7, and 5 years respectively.[5] None are females.

The report noted, however, that the requirement that patrol officer applicants must possess a college degree, and the fact that the minority labor market in North Dakota is sparse, "will make it extremely difficult for the patrol to recruit Native Americans in the future."[6] Among other NDHP affirmative action efforts, the report recommended that during recruitment periods a full-time Indian recruiter be reassigned for the purpose from regular patrol duties.[7]

The NDHP applicant selection process contains seven steps: the above-mentioned qualifications, a written examination, an oral interview, a background investigation, a physical examination, training, and a probationary period.[8] The Marquette report recommended several changes in the selection process. The recommendations included a review of the 4-year college degree requirement, written guidelines to determine what is "good moral character," requiring cultural awareness training for the background investigators, and revising the application form to eliminate preemployment inquiries into race and sex.[9] NDHP Col. Ralph M. Wood informed the North Dakota Advisory Committee that the application form has been revised since the Marquette report was published.[10]

All NDHP officers are required to complete successfully the Highway Patrol Academy program of 1,029 hours at the Law Enforcement Training Center, plus an additional 125 hours of field work prior to assignment at a field station.[11] In addition, sworn personnel receive 40 hours of inservice training annually. The NDHP personnel are also encouraged to pursue programs of higher education and may receive a 1-year leave of absence to do so. All of the required training is conducted at the North Dakota Law Enforcement Training Center located in Bismarck.

The North Dakota Law Enforcement Training Center, operated by the NDHP, offers free training to any full-time, paid officer in North Dakota. The only cost to each law enforcement department is transportation and wages. According to Colonel Wood, Indian tribal police officers are eligible to receive training, but not many do so.[12]

The training program for fiscal year 1977–78 lists 36 training sessions ranging from 2 days to the 18-week Highway Patrol Academy course for NDHP officers. Topics range from inservice training to juvenile relations. In the academy 1,029-hour curriculum, 4 hours are spent on minority relations, 4 hours on human relations, 12 hours on crisis intervention techniques, and 8 hours on alcohol-related problems.[13]

The Burleigh County Sheriff is designated by the North Dakota constitution as the chief law enforcement officer of the county and is elected to serve for a 4-year term.[14] The sheriff's office has jurisdiction over all of Burleigh County, including the area within the city limits of Bismarck, a total of approximately 2,000 square miles.[15]

The sheriff's office employs 16 patrol officers, seven jailers, three clerks, one full-time cook, and one part-time cook. All employees are white males except for one female matron and the three female clerks. There are no Native American employees. Sheriff Bob Harvey told Commission staff members that he is amenable to hiring Indians but, since he has been in office, only two have applied. He believes that the biggest problem may be that patrol officers are required to supply their own patrol cars. Because the department is only authorized to reimburse the officers for the use of their cars at the rate of 20 cents per mile, working for the sheriff's office can be expensive. The problem will be solved, he feels, if the county commissioners purchase a fleet of eight cars as has been requested.[16]

Richard Beck, chief deputy for the sheriff's office, informed the Advisory Committee that the sheriff's office is not under the State civil service system and the only requirement for employment in terms of training and education is the possession of a high school diploma or the equivalent. (p. 185)

The sheriff's office does not have its own affirmative action plan but follows the county plan. This plan specifies that an EEO officer appointed for the purpose has responsibility for developing procedures to implement the plan. J. Kenneth Harlow, Burleigh County auditor, serves in this capacity.[17] The sheriff, like other department heads, is responsible for "setting goals and timetables for bringing their departments into compliance with the overall affirmative action program."[18] No information was provided to the Committee indicating that the sheriff's office has goals and timetables for hiring Indian personnel, male or female. Sheriff Harvey indicated that only one Native American (who was not found to be qualified) had applied for a position in the last year and a half. If a qualified Indian did apply and there was a vacancy he would, he said, like to hire him.[19]

Deputies, once hired, begin immediately to receive orientation and on-the-job training.[20] Within the first year of their employment they are required to complete 200 hours of instruction at the North Dakota Law Enforcement Center. (p. 185) Sheriff Harvey does not feel this is enough and would like to see this requirement extended to 400 hours, which should include more human relations sensitivity courses.[21]

The jurisdiction of the Bismarck city police department includes the city and extends one-half mile outside the city limits when enforcing a city ordinance and one and one-half miles outside the city when enforcing a State ordinance.[22] The department is responsible to the city commission, which is composed of five commissioners, each of whom has responsibility for certain aspects of city government.[23] Commissioner Harry J. Pearce, an attorney, was given the portfolio for the police department. (p. 168)

All personnel matters for the department are handled by the city personnel department, which is responsible for recruitment and certification of applicants. After personnel certifies the applicants, the police department interviews them and makes the final selection from among the top three candidates. There are 57 police department employees. Only one, a male police officer, is Native American. Only one Indian has applied for a position with the department since July 1977. Police Chief Vern Folley could give no explanation for the lack of Indian applicants. He informed the Commission that his department would like to do more recruiting, but it would require "too many manhours" and the department is already understaffed according to "Federal and State statistics." He estimates his department is 20 people short.[24] In 1976 Bismarck had 1.56 police officers per 1,000 population, which is below the national average of 1.7 for urban areas and 1.6 for suburban areas.[25]

North Dakota has no statewide uniform standards for entrance into police employment. Each community develops its own standards.[26] The Bismarck police department requires only that candidates for the position of police officer have a high school diploma.[27]

The Bismarck police department has no separate equal employment opportunity (EEO) program or affirmative action plan (AAP), but is included in the AAP for the City of Bismarck.[28] The plan requires that every department in the city "shall annually be required to analyze their work force and to set goals for the employment of minorities and women."[29] No information regarding specific goals and timetables for the employment of Indians or women by the police department was provided to RMRO. This city AAP, revised on April 30, 1975, has not been updated since that time.[30]

The April 30, 1975, Bismarck affirmative action plan given to the Commission by Erwin Weisenburger, personnel director, apparently complied with Federal Law Enforcement Assistance Administration (LEAA) requirements. This plan demonstrated that women comprise 40 percent and minorities 1.3 percent of the adjacent Morton and Burleigh County labor forces, whereas only 22 percent of the city employees are minorities and women. The city concluded that the total deficiency of the work force for females and Indians is 19.3 percent. The plan's goal and timetable was to correct 4.5 percent of this imbalance each year for the next 5 years. However, the EEO program has apparently not been updated since April 30, 1975, and Weisenburger stated that, in fact, cutbacks in the number of female employees have occurred since that time.[31]

As with the sheriff's office, inhouse training is conducted for new police officers by the department itself, and in 1976 they were given 5 weeks' training by the North Dakota Law Enforcement Training Center.[32] Chief Folley stated that this has been expanded to 7 weeks and that, following this basic training, inservice training continues for a year.[33]

Chief Folley and Commissioner Pearce both stated at the Advisory Committee's public meeting that city police officers received little, if any, training in Native American culture despite the large number of contacts between police officers and Indian people. Folley declared his intention of directing his attention to the need for more specialized training in the area of human or race relations. (pp. 192–93)

Art Raymond, Advisory Committee member, stated that the lack of law enforcement sensitivity to Indian culture is a common complaint expressed by the Native American population. "Police training and human relations or culture sensitivity which could [end] misconception about Native Americans is almost totally nonexistent," he said. (p. 18) Louis Plante, project director of the Bismarck Indian Center, and Juanita Helphrey, director of the North Dakota Indian Affairs Commission, testified that they had never been requested to provide any kind of sensitivity training for Bismarck city police. (p. 43)

Equal Employment Opportunity Requirements

As a result of the Omnibus Crime Control and Safe Streets Act of 1968,[34] the U.S. Department of Justice issued guidelines relating to the general equal employment opportunity responsibilities of agencies receiving LEAA funds.[35] The guidelines state that recipients of LEAA funds, including State and local police and criminal courts, which employ 50 people or more and have received at least $25,000 in funds since 1968, must implement an equal employment opportunity (EEO) affirmative action program for minorities and women if the population they serve has a minority representation of 3 percent or more.[36] The Bismarck city police department is the only agency in Burleigh County to qualify under these requirements.[37]

EEO programs must include job classification tables, past disciplinary actions taken against employees, applications, promotions, terminations accepted and acted upon, area labor force statistics, and a detailed analysis of programs classified by race, sex, and national origin. The program must be disseminated to the general public. Failure to comply with the guidelines would subject recipients to sanctions, including a termination of Federal funds received. All EEO program records must be available for review by the State planning agency, the North Dakota Combined Law Enforcement Council, or LEAA. The LEAA guidelines specifically state that this agency is responsible for ascertaining that EEO programs have been implemented.[38] Despite these regula-

tions, Oliver Thomas, executive director, stated that the North Dakota Combined Law Enforcement Council (NDCLEC) does not have responsibility for reviewing EEO programs for compliance with LEAA guidelines. The NDCLEC responsibility ends, he said, when a qualifying grant-receiving agency files a simple statement that it has an affirmative action plan. (p. 244) Thomas agreed that this was a meaningless requirement unless accompanied by a mandate to monitor specific EEO programs. (p. 244)

He further testified that there are four LEAA programs in Burleigh County: the Bismarck police program, the police youth bureau program, the Bismarck Junior College criminal justice education program, and the jailers training program. Thomas stated that none of these employs any Indians. (pp. 240–41) The NDCLEC itself has 33 members and of these, 3 are women and 1 is a Native American man. Eighteen members are appointed by the Governor and 15 are designated by statute. (p. 248)

Law Enforcement and Alcohol Problems

Until 1969, persons in North Dakota could be arrested simply because they were publicly intoxicated. At that time the State legislature repealed laws that allowed such arrests and passed a statute permitting police to transport "apparently intoxicated persons" home or to a hospital where they can be held involuntarily for a maximum of 72 hours. If they are a danger to others or themselves, they can be taken to jail for detoxification, to be held for no longer than 24 hours.[39]

Kent Higgins, former Burleigh County public defender, testified that:

> Since the result of taking an intoxicated person home is apt to lead to a domestic dispute, and since the hospitals are often reluctant to admit these people and there's the question of costs there, the almost inevitable result is that the person is simply held in jail overnight and released in the morning. (p. 89)

He stated that since such a procedure is not deemed an arrest there is no subsequent prosecution and therefore persons were not entitled to appointed counsel. However, he said, there is often a record made of the fact that these people have been detained. It was his impression that this goes on the FBI "rap" sheet as on any other occasion in which people are detained and fingerprinted. (p. 89) Sheriff Harvey explained that intoxicated persons who are misbehaving are incarcerated in a jail cell for up to 8 hours, and a record of this is kept in the sheriff's office. Separate case records are kept for patients treated in the detoxification center that was constructed in the fall of 1977.[40]

John Olsen, State's attorney in Burleigh County, testified that his office had never charged out a criminal case against a Native American that has not involved alcohol. He stated:

> ...I knew the statistics would be high, like 75 percent or 85 percent.... We went over all those cases and alcohol has been involved in 100 percent of them.
>
> [I knew that in] the...overwhelming majority of those cases it would be alcoholism, and even more than that it would be under the influence of alcohol, and the remainder ... involved ... drinking ... to a limited extent...and probably [in the] remainder of the cases alcohol wasn't a determining factor in the commission of the crime..., but it was there....(p. 127)

Guy Roland McLaughlin, a Native American police officer in Bismarck, stated that the most common offenses for which Native Americans were arrested were "alcohol" and domestic problems related to alcohol. He further said that almost all Indian offenses have some connection with alcohol. (p. 224) The high incidence of alcohol-related crimes among Native Americans was also confirmed by Police Commissioner Pearce. (pp. 174–75) Ample documentation shows that excessive use of alcohol is involved in a majority of Native American arrests nationwide.[41] Statistics from one study demonstrated that the number of Indian arrests for alcohol-related crimes is 12 times greater than the national average.[42] There is some evidence to indicate that alcohol is also a significant factor in crimes committed by whites in Burleigh County. For example, as indicated in table 2, Bismarck police arrested 524 persons in 1975 for a violation of liquor laws or driving under the influence of alcohol. Of these, 467, or 90 percent, were non-Indian. It would appear, therefore, that progress in solving drinking problems in North Dakota would reduce considerably the incidence of arrests for all persons.

Though Indians are arrested more frequently than other Americans for alcohol-related crimes, there has been no definitive study showing that Indians have a higher propensity for alcohol. Dr. Philip A. May has questioned much of the earlier literature that pictures Indians as different from other Americans in terms of drinking habits. He wrote that many Indians by virtue of their culture—the structure of their society and the laws that affect them—tend to drink in places where they are conspicuous. He also noted that people in conspicuous places are easy for cultural scientists to study.[43] And for police to find, it might be added.

The U.S. Department of Health, Education, and Welfare has estimated, however, that the prevalence of alcoholism among Native Americans is at least twice the national average.[44] The apparent proclivity of Indian people to alcohol abuse, or their tendency to drink in public places, has given rise to numerous myths and stereotypes of "drunken Indians" who "cannot hold their liquor"—myths that are degrading and damaging and in no way describe all Native Americans.

Recent studies have demonstrated decisively that the rate of alcohol metabolism is virtually the same in Native Americans and whites, putting to rest the popular belief that Indians are inherently prone to "inordinate craving for liquor and more prone to lose control over their behavior when they drink."[45] The authors of these studies have concluded that the causes of Indian drinking are historical, social, and cultural rather than biological. According to Reuben Snake, chairman of the American Indian Policy Review Commission's task force on alcoholism, drug, and substance abuse, "Whatever [alcohol] problems Indians have, it's the social system that screwed them up."[46]

At the time of the Advisory Committee's public meeting, there were no detoxification programs or facilities in Burleigh County except a cell in the county jail.[47] Commissioner Pearce testified that intoxicated persons were simply held in a jail cell until they were detoxified and then released without any rehabilitative treatment. (p. 175)

Dr. Ronald W. McNichol, clinical director of the alcohol and drug division at the North Dakota State Hospital testified that a detoxification center should have nurses and physicians available, and that patients should have a minimum of 24 hours' supervision to prevent death due to withdrawal convulsions that occur in at least 5 percent of the cases. Medication and access to a hospital emergency room for use when necessary were also requirements he specified. As to detoxification facilities available at that time in Burleigh County, he said: "A jail cell for detoxification, that is a crime. With no supervision, with nothing else, that's criminal, in my opinion. They got the wrong person in the cell." (p. 151)

In October 1977, the jail cell used for detoxification in Burleigh County was replaced with facilities resulting from remodeling the sheriff's former residence next to the jail. A detoxification program, funded by a grant from the State health department, employs a full-time counselor and a part-time secretary. Contractual agreements with the local hospitals, a local nurses training school, and local clinics provide for medical supervision and treatment of public inebriates. Sheriff Harvey considered this program, which can handle 8 people, or 16 in an emergency, to be adequate for the present. He felt, however, that the construction of an enlarged detoxification center at a medical institution is needed for the future. This would also allow treatment of intoxicated persons from surrounding counties that at present have no such facilities.[48]

The North Dakota State Hospital in Jamestown has a comprehensive program for alcoholics that includes four distinct levels of treatment. The average daily census for this program is about 140 persons.[49] At the time of the Advisory Committee's public meeting in December 1976, about 40 percent of these were Native Americans.[50] Most Native American patients are assigned to the program by North Dakota courts as an alternative to incarceration.[51]

Participation in the Driving While Intoxicated (DWI) Counter Attack Program at the Memorial Mental Health and Retardation Center in Mandan is also used as an alternative to other forms of sentencing on DWI charges by judges in Burleigh County, as well as in 10 other counties in the State.[52] This program involves treatment, counseling, and rehabilitation. Approximately 15 to 20 percent of the participants in this program are Native Americans.[53]

Notes to Chapter 2

1. North Dakota Combined Law Enforcement Council, *1976 Comprehensive Plan of Action* (hereafter cited as the *1976 Comprehensive Plan of Action*) (1975), p. II–48.

2. Ralph M. Wood, North Dakota Highway Patrol superintendent, letter to the Rocky Mountain Regional Office, Dec. 15, 1977.

3. Hearing Transcript, p. 217.

4. *1976 Comprehensive Plan of Action.*

5. Center for Criminal Justice Agency Organization and Minority Employment Opportunities, *Final Report on the Employment Practices, Personnel Procedures and Training Program of the North Dakota Highway Patrol* (hereafter cited as *The Marquette Report*) (Marquette University Law School: August 1977), p. 6.

6. Ibid., p. 7.

7. Ibid.

8. Ibid., pp. 11–16.

9. Ibid., pp. 16–23.

10. Col. Ralph M. Wood, NDHP superintendent, interview with RMRO staff in Bismarck, Dec. 15, 1977.

11. *The Marquette Report*, pp. 25–26. Also, Ralph M. Wood, letter to Dr. Shirley Hill Witt, Apr. 28, 1978.

12. Ibid.

13. Ralph M. Wood, letter to Dr. Shirley Hill Witt, Apr. 28, 1978.

14. *1976 Comprehensive Plan of Action*, p. II–34.

15. Sheriff Bob Harvey, interview with RMRO staff in Bismarck, Dec. 15, 1977. Also, Bob Harvey, letter to Dr. Shirley Hill Witt, Nov. 30, 1976.

16. Ibid. Also, Bob Harvey, letter to Dr. Shirley Hill Witt, May 1, 1978.

17. RMRO staff telephone interview, Mar. 30, 1978.

18. "Affirmative Action Plan for the County of Burleigh," submitted to RMRO by J. Kenneth Harlow, auditor, Jan. 23, 1978.

19. Interview with RMRO staff in Bismarck, July 13, 1976.

20. Sheriff Bob Harvey, interview with RMRO staff in Bismarck, July 13, 1976.

21. Ibid.

22. Vern Folley, chief, Bismarck City Police Department, interview with RMRO staff in Bismarck, Dec. 15, 1977 (hereafter cited as Folley Interview, Dec. 15, 1977).

23. *1976 Comprehensive Plan of Action*, p. II–43.

24. Folley Interview.

25. *1976 Comprehensive Plan of Action*, P. II–47.

26. Ibid.

27. Information supplied to RMRO by Erwin Weisenburger, personnel director, City of Bismarck, Oct. 13, 1976.

28. Erwin Weisenburger, letter to Dr. Shirley Hill Witt, Oct. 13, 1976; RMRO staff interview, Oct. 5, 1976 (hereafter cited as Weisenburger Interview, Oct. 5, 1976).

29. "Affirmative Action Plan for the City of Bismarck," 1975, p. 6.

30. Erwin Weisenburger, interview with RMRO staff, Dec. 15, 1977.

31. Ibid., and "Affirmative Action Plan for the City of Bismarck," revised Apr. 30, 1975.

32. Weisenburger Interview, Oct. 5, 1977.

33. Folley Interview, Dec. 15, 1977.

34. Section 501 of Pub. L. 90–351.

35. 28 C.F.R. §42.301 et seq.

36. 28 C.F.R. §42.302(d). Service population is defined as the State population for State agencies, county population for county agencies, and municipal population for municipal agencies [28 C.F.R. §42.302(f)(2)].

37. Oliver Thomas, executive director, North Dakota Combined Law Enforcement Council, hearing transcript, p. 240.

38. 28 C.F.R. §§42.304, 42.305 and 42.308.

39. N.D. Cent. Code §5–01–05.1 et seq.

40. Sheriff Bob Harvey, telephone conversation with RMRO staff, May 17, 1978.

41. Philip A. May, "Arrest, Alcohol, and Alcohol Legalization Among the American Indian Tribes," *Plains Anthropologist* (1975), p. 130.

42. O. Steward, "Questions Regarding American Indian Criminality," *Human Organization*, vol. 23 (1964), pp. 61–66, as quoted in Edward P. Dozier, "Problem Drinking Among American Indians," *Quarterly Journal of Studies on Alcohol*, vol. 27 (1966), p. 63.

43. Philip A. May, "Not all Indians Drink: Evidence Against the Stereotype" (paper presented at the American Association for the Advancement of Science, Missoula, Mont., June 14, 1976), p. 4.

44. "Metabolic Variations in Alcohol Absorption," *Official Newsletter of the Association of American Indian Physicians*, June 1976, p. 5.

45. Lynn J. Bennon and Tin-Kai Li, in "Alcohol Metabolism in American Indians and Whites," *New England Journal of Medicine*, vol. 294 (1976), pp. 9–13; Robert A. Musicant and Arthur R. Zeiner, "Ethnic Patterns and Differences in Alcoholism" (paper presented at the Fifth Annual Meeting of the Association of American Indian Physicians, Chickasha, Okla., August 1976); Dozier, "Problem Drinking Among the American Indians," p. 74.

46. *United Tribe News*, June 30, 1976.

47. Ron Goodman, director of substance abuse at the Memorial Mental Health and Retardation Center in Mandan, Hearing Transcript, p. 259; and John Olsen, State's Attorney in Burleigh County, hearing transcript, p. 128.

48. Sheriff Bob Harvey, letter to Dr. Shirley Hill Witt, May 1, 1978, and telephone conversation with RMRO staff, May 15, 1978.

49. Dr. Ronald W. McNichol, Hearing Transcript, pp. 135–36.

50. Harry Nielson, North Dakota State Hospital staff person, Hearing Transcript, p. 136.

51. Dr. Ronald W. McNichol, Hearing Transcript, pp. 137–40.

52. Ron Goodman, Hearing Transcript, pp. 256 and 260.

53. Ibid., p. 261.

3. Native Americans and the Court System

Description of the North Dakota Court System

North Dakota has a multitiered court system. If an individual violates a city ordinance (not a State offense), the case is brought before the judge in municipal court who hears the case without a jury. In Bismarck, or any city of 3,000 or more residents, the municipal judge must be an attorney unless none is available.[1] If an individual appeals a municipal court decision, a new trial will be held either in a district court or a county court of increased jurisdiction (described below). The case will be tried before a jury if requested by the accused.[2]

County justice courts hear all State misdemeanors committed within a county.[3] County justices must be attorneys and may serve more than one county.[4] Citizens of a county may also vote to create a county court of increased jurisdiction, which, in addition to jurisdiction over misdemeanors, has concurrent jurisdiction with district court to hear appeals from municipal court.[5]

The State's district courts have authority to try both felonies and misdemeanors, although they rarely hear misdemeanor cases. A district court also has jurisdiction to hear appeals from judgment of county justices.[6] There are six judicial districts in North Dakota, and District Four, which includes Burleigh and seven other counties, is allocated three judges who are elected to 6-year terms.[7]

Consistent with the finding that the number of Native Americans who are arrested in Burleigh County, or who are incarcerated in the county jail, is out of proportion to their representation in the general population are indications that Indian cases comprise a high proportion of the total number that come before the courts. John Olsen, State's attorney in Burleigh County, testifying at the Advisory Committee's public meeting in Bismarck stated that at that time (December 9, 1976) 6 out of the 23 felony cases pending prosecution in district court involved Indian defendants. He estimated this proportion of approximately 25 percent Native American defendants would hold true throughout the year. (p. 128) Kent Higgins testified that, over a 2-year period (1973–74) during which he was public defender, out of 105 criminal cases in Burleigh County in which he served as defense counsel 20 of them, or 19 percent, involved Native Americans. (p. 82)

David Petersen, former Assistant United States Attorney, also testified that, during the 3 years he served as Assistant U.S. Attorney in the mid-1970s, by far the majority of the cases handled in the criminal sector had to do with Native Americans. (p. 99) He pointed out that his jurisdiction included the western division of North Dakota, which contains the Fort Berthold and Standing Rock Indian Reservations, and, hence, his workload included prosecution of Indians for offenses committed on the reservations under the Major Crimes Act.[8] (pp. 99–100)

Defense Counsel

Based upon the 6th and 14th amendments to the Constitution, the Supreme Court has firmly established the principle that a defendant is entitled to consult freely and privately with an attorney at every critical stage of judicial proceedings, including questioning by police officers when arrested.[9] A counsel, appointed by the court, is required to represent defendants who cannot afford to hire an attorney.[10] This includes misdemeanor proceedings in which incarceration is threatened.[11]

For a 4-year period, beginning in April 1971, Burleigh and nine other geographically adjacent counties in North Dakota had a public defender system.[12] This was funded by a LEAA grant as an experimental pilot project that ended on January 1, 1976. During its 4 years, the public defender's office handled between 175 and 200 cases, about half of which came from Burleigh County.[13] A proposal for a statewide public defender system, based upon information and data resulting from

that project, was submitted to the legislature in 1976 but was killed in the appropriations committee.[14]

The system for court appointments of defense attorneys then reverted to what it was prior to the existence of the public defender program, a roster system based upon a list of lawyers willing to accept court appointments.[15] During the last few months of 1976 the courts contracted with two local law firms to provide legal services for a fixed monthly fee.[16] The State's attorney felt one of these firms to be relatively inexperienced.[17] The roster system is still used for cases where there is potential conflict of interest.[18] Approximately 12 attorneys are available for appointments in criminal cases under this system.[19]

Higgins pointed out that, though Native Americans are only part of the potential indigent defendant group, they tend to utilize court-appointed attorneys to an extent that substantially exceeds their percentage in the population. (p. 93) Judges tend to appoint younger, inexperienced attorneys in criminal cases in which the penalty is less severe, or the outcome is considered to be hopeless, in order to give such attorneys practical experience. In cases that involve a substantial factual question, judges are inclined to appoint more experienced counsel.[20] Irvin Nodland, Bismarck attorney, pointed out, however, that when a new or inexperienced attorney takes a criminal case it does not necessarily mean that the client is not going to get good legal representation. They might, he said, get better service because new attorneys tend to be more enthusiastic.[21]

Low pay for court-appointed attorneys and delays in payment are factors that discourage more experienced attorneys from representing indigent persons. Nodland stated that delays in payment of 10 to 18 months are not uncommon.[22] Trial judges often cut the final bill of appointed counsel by refusing to reimburse them for all of the time they have expended on a case or by setting some arbitrary limit on the fee.[23] Though the South Dakota Supreme Court recently raised the pay scale for court-appointed attorneys from $25 to $35 per hour, this amount is still felt to be inadequate.[24] Fourth Judicial District Judge Thompson said:

> There's no question but that defense of criminals in North Dakota has not been a lucrative proposition; it's be just the opposite. Generally the person who defends in North Dakota...makes no money at it; he takes it because he is responsible to the oath which he took, because he has that regard for the oath. (p. 206)

Several justice officials and attorneys who testified at the Advisory Committee's factfinding meeting in Bismarck were of the opinion that a public defender system is badly needed in North Dakota. Nodland, who was instrumental in the creation of the 10-county office, stated that he felt the public defender's office should be reestablished on a statewide basis and that it should be tax supported, as are other services to indigent persons. (p. 49) The reason he gave for this opinion was that he "...couldn't imagine...a more unequal application of criminal justice than what's happening now in terms of the availability of counsel for Indian people." (p. 56) Higgins supported this need and stated that such an office would be of special benefit to Native Americans whose representation in the indigent defendant group far exceeds their percentage in the population. (p. 93)

David Petersen stated that the North Dakota Criminal Justice Commission on which he serves concluded that a public defender system should be developed. Its creation, he said, would help to alleviate "hit and miss" practices on the part of the defense that occur sometimes when a full-time criminal defense counsel is lacking. (p. 105) He also stated that a full-time prosecutorial system would also enhance the criminal justice system in North Dakota. (p. 106) At present, only 4 counties in North Dakota (Burleigh, Cass, Grand Forks, and Ward), out of a total of 53, have full-time State's attorneys.[25] Petersen felt that both the prosecutorial system and the public defender systems should be statewide, but set up on a regional or district basis. (pp. 112–13)

Petersen pointed out that where there is not a public defender system the prosecution has the resources of the State to draw upon which gives it the advantage, since these resources are not available to the defense. He stated, however, that as a practical matter: "the legislature [in North Dakota] is not going to set up a full-time defender system before a full-time prosecutorial system is set, for...they don't want the defense any better than the prosecution." (p. 116)

Olsen, Burleigh County State's attorney, also went on record as favoring a full-time defender system (p. 122), as did Calvin N. Rolfson, deputy attorney general for North Dakota. Rolfson said: "I personally believe a public defender system is desirable...primarily because it would provide a greater uniformity in the delivery of defense services that may not be available now." (p. 264)

In a similar vein, Judge Thompson testified:

> Something must be done...to guarantee adequate defense to persons accused of crime who cannot pay for their own defense. It is unfair and unjust that the State have available to it fully paid prosecutors who make this their business, who become experts in it, and that the indigent person must take what's left over of the practicing lawyers who have too much to do,...who don't like the criticism which the public wrongfully bestows upon them because [their clients are] no-good criminals.... (p. 205–06)

Plea Bargaining

Data maintained for the first year of operation of the public defender's office indicate that fewer than 6 percent of felony cases actually went to trial. The vast majority of the rest were plea bargained. Statistics show that 30 percent of the felony cases were either dismissed outright or that there was acquittal. Of the remaining 70 percent, primarily through plea bargaining, 40 percent received probationary sentences, and 30 percent were incarcerated.[26]

During the plea-bargaining process, a defendant agrees to plead guilty if certain conditions are met. Usually the prosecution agrees to recommend a relatively lenient sentence, to reduce the charges, or to dismiss other charges.[27] The judge, however, does not have to accept a plea-bargaining agreement and is empowered to hold a trial if a defendant refuses to plead guilty without any preconditions.

Plea bargaining is widely practiced, not only in North Dakota but throughout the United States, and is the subject of considerable controversy. Points of view regarding its merits differ considerably. A study done in South Dakota showed that one objection often raised is that it allegedly leads to the practice of overcharging by police officers, which applies extra pressure to a defendant to plead guilty to a lesser charge.[28]

Higgins stated that it is difficult to assess the advantage or disadvantage to Native Americans of such a practice. It was his judgment that where the defense counsel and the prosecutor are competent, and where they know the sentencing judge well, plea bargaining does very substantial justice. (p. 97) He does not feel that the practice is routinely abused in North Dakota, though he stated that this may become the case unless "adequate resources" are provided for the criminal justice system. (p. 98)

Judge Thompson testified that without question plea bargaining has a place in the justice system, but that it can adversely affect the defendant to this extent:

> If he doesn't have adequate counsel, and the individual is afraid of his lawsuit, and sometimes if he has adequate counsel and [his counsel is] not really committed to the defense of the accused,...plea bargaining is going to hurt because he's going to bargain away...the defendant's rights...for something less than he could get. (pp. 203–04)

He also stated, however, that he had seen other instances where the State had a relatively good case but decided that rather than put the public to the expense of a trial they would plea bargain away a conviction that would have resulted if it had been tried in court. (p. 205)

Nodland testified that in a number of cases he has had Indian clients who want him to plead them guilty even when the circumstances would indicate otherwise. (pp. 49-50) He stated:

> I...came to the conclusion that it isn't so much that the individual wishes to plead guilty, as it is that the...individual Indian person feels that he can't really get a fair shake, that he won't get a fair trial, and that the best thing to do is to do like my three or four older brothers and plead guilty and go to the pen like they did and get it over with. That's just a part of growing up, it's something you accept and you do it and you don't go through this...thing that is viewed as being a charade.
>
> [E]very once in awhile, including this year, I have had experiences like that, where...I've had the rather uncomfortable job of trying to convince somebody that they should plead not guilty when the individual himself doesn't want to. (p. 50)

Before a court accepts a guilty plea, it must ensure that the defendant understands the nature of the charge, the minimum and maximum punishment for the offense, and that the accused has the right to plead not guilty. The magistrate or judge must also guarantee the defendant understands that by pleading guilty the accused waives the right to further trial, the right to trial by jury, and the right to confront witnesses. The court must determine that a guilty plea is made voluntarily.[29] If needed, the court may appoint an interpreter to assist the defender at any time during the proceedings.[30]

Ben Pulkrabeck, whose Bismarck law firm has a contract with Burleigh County to provide legal counsel for indigent defendants, said he does not know why, but "you have to fight with [Indian defendants] to get them to plead not guilty or consent to a preliminary hearing."[31] Sometimes by the time he enters the case the defendant has waived the preliminary hearing and he must backtrack and file a motion to get it. He said Native Americans often want to plead guilty and avoid the trial process, not seeming to realize that it may mean a long prison term for them.[32]

Albert Wolf, a Bismarck attorney and former State's attorney, also confirmed that Native Americans are more inclined to plead guilty and waive their right to counsel than are whites. He stated that it is difficult to tell whether a guilty plea is an admission of guilt or a reflection of something else—distrust of court-appointed counsel or a problem of communication. Communication between Indian defendants and court-appointed counsel, he said, is something that takes a long time to develop.[33]

Communication

A number of persons who provided information to the Advisory Committee felt that communication between Indian clients and their attorneys or the courts was a problem. Richard Baer, who defended six Native American clients in Burleigh County during 1976, stated flatly, "There is no communication whatsoever at the court level."[34] Leonard Bucklin, a Bismarck attorney in private practice, saw communication as a problem based upon lack of cultural understanding between white and Indian cultures.[35] Pulkrabeck also stated that communication with Native Americans is a serious problem for attorneys and the courts as well as for law enforcement officers and feels that the solution may lie in providing more education for Indian people regarding their legal rights.[36]

Nodland considered the lack of communication to stem largely from cultural differences. He testified:

> [T]here are also some instances that I have personally experienced where...cultural differences in the way you think about law and lawlessness cause me to be on a different wave length than my client.... And that's a cultural communication thing...between myself and my own client, and I think it's magnified with people who have less contact with Indian people than I do. (pp. 52–53)

Nodland thinks there are some good things happening to help remedy this problem. He was enthusiastic about the Indian curriculum program at the United Tribes Technical Center in Bismarck that serves to provide public school students with an awareness of Native Americans and their culture. He also felt that the center's television program, "Indian Country Today," directed by Harriett Skye, Chairperson of the Advisory Committee, serves the same purpose for the general public. (p. 56)

Bail

The eighth amendment to the U.S. Constitution clearly guarantees a defendant reasonable bail except when charged with a crime (a capital offense) punishable by death or life imprisonment. North Dakota includes this right in its own statutes. It states that a defendant will be released on personal recognizance on execution of an unsecured appearance bond pending trial unless the magistrate determines at the initial appearance that release without bail will not reasonably ensure the presence of the defendant at further proceedings.[37] The commentary to this rule makes clear that the only purpose of bail is to ensure that the defendant appears at every stage of prosecution.

SAC member Art Raymond alleged at the Bismarck public meeting that Native Americans have more trouble than their white counterparts in raising money for bail and therefore have to spend more time in jail. One reason that he saw for this was that the trust status of reservation lands which Indian people own makes them a poor risk in the

eyes of the court because such property cannot be accepted as security. (pp. 17–18)

A number of people who provided information to the Committee also felt that it was indeed true that the present bail system works a hardship on Indian people. Commissioner Pearce testified that though bail procedures are standardized they impose additional hardships on any group of persons who have little money. (p. 177) State's Attorney Olsen agreed and stated that "the bulk of jail time spent...is done by Indian defendants" because they do not bond out proportionately as often as white defendants do. He emphasized, however, that typically bail is set in such a manner that most persons are released. (pp. 119–20) He indicated that when this is not the case the defense attorney will usually bring a demand for a speedy trial though, unlike the Federal system, there is no requirement in North Dakota as to how soon a trial must begin. (p. 212)

Several attorneys interviewed during the investigation felt that though most judges were fairly consistent in their policies for setting bail for both Indians and whites, most Native Americans not only have more trouble raising money for bail but are also more apt to be refused personal recognizance bonds.[38]

Judge Thompson testified that his court was concerned only with the guarantee of appearance and that he followed the uniform bail schedules that are in effect. He stated, however, that the public impression that bail is a form of punishment for individuals accused of a crime is at the bottom of any abuse of the bail system. He further commented:

> If the public could be convinced that bail, and the purpose of bail, is only to guarantee appearance, we would have made a tremendous stride forward. But because they misunderstand the purpose of bail, they criticize the courts, they criticize the law enforcement people, the prosecution, for more leniency than what they feel should have been shown in setting bail. (pp. 195–96)

He also pointed out that in his observation most Indian persons are transient. The courts are almost invariably confronted by the prosecution with the proposition that because of this transciency they must be dealt with more strictly than if they were residents with family and local property. (p. 197) He added:

> [There is] no question in my mind [but] that many prosecutors feel that the obligation which they owe to people who elect them is higher than the obligation which they owe to people who don't elect them. [Therefore transient Indian defendants may be dealt with more harshly than defendants who are local residents.] (p. 197)

Bail bonds are not available in Burleigh County. In order to post bail a defendant must either put up property as surety, post cash, or make arrangements for a cash bond through a bonding company in either Fargo (190 miles) or Minot (130 miles). Professional bondsmen located in those cities charge a 10 percent fee that is kept by the bonding agent whether or not the defendant makes all required court appearances and regardless of guilt or innocence.[39]

Jury Makeup and Attitudes

The sixth amendment of the U.S. Constitution guarantees a defendant a trial by an impartial jury. Without question, all defendants who plead not guilty have this right unless they choose to be tried by a judge only. In some instances persons contacted by the Advisory Committee questioned the impartiality of juries in trials of Native Americans. The basis for this dissatisfaction with juries stemmed from the lack of representation of Indian persons on juries in Burleigh County and alleged prejudicial attitudes of potential jurors.

In selecting jurors for a trial, the State must not exclude citizens because of race, color, religion, sex, national origin, or economic status. North Dakota law states that jurors are to be selected from a master list of actual voters and as designated by the supreme court from other lists that name utility customers, property taxpayers, and persons who have registered vehicles and are licensed drivers. Currently, only lists of actual voters and driver's license lists are utilized.[40]

Information gathered by the Advisory Committee indicated overwhelmingly that it is a rare event when an Indian person is called for jury duty. State's Attorney Olsen stated that he has never seen a Native American serve on jury duty.[41] Nodland and Baer, whose law firms serve a large number of Indian clients, confirmed that the same was true of their own experience.[42] Other Bismarck attorneys also stated that they had seen few, if any, Indian jurors.[43]

In 1975 Thomas M. Disselhorst conducted a study of jury selection for the U.S. District Court of North Dakota to determine the extent to which Indians are represented on Federal petit (trial) and grand jury panels.[44] In 1973 there were 7 nonwhite males and 2 nonwhite females (a total of 0.45 percent) out of 2,000 prospective petit jurors in the Southwest Division of North Dakota (which includes Burleigh County). Qualified nonwhite jurors accounted for only 0.8 percent of the total though, according to the 1970 census, their proportion in the total population of North Dakota amounted to 2.4 percent. Statewide that year there were 39 qualified nonwhites, also comprising 0.8 percent of the total 4,610 qualified jurors. Census figures for 1970 showed that 78 percent of all nonwhites in North Dakota are Indians.[45]

During 1973 in the Southwest Division, 2 Indians appeared on the petit jury panel, which totaled 122. Statewide there were 5 Indians out of 507 members of the jury panel. In that division during 1974, there were no Indians on the panel out of a total of 130 persons, while in 1975 there were 2 Indians out of a total of 147 persons on the panel.[46] From 1973 to 1975, no Indians appeared on prospective Federal grand juror panels of 50 each year, and there was only 1 Indian prospect in 1976, who then was not called to serve.[47]

Some difference of opinion exists regarding the necessity for Indian representation on juries to ensure that a Native American gets a fair trial. Former Assistant U.S. Attorney Petersen testified that he believes that "the people of North Dakota who serve in the capacity of jurors in my experience are able to render a fair and impartial verdict on evidence that's presented to them." (p. 102) State's Attorney Olsen also stated that he thinks North Dakota juries are basically fair.[48] Allen I. Olson, State attorney general, stated that, though there are inevitably certain prejudices in any jury, the system is designed to overcome prejudice, and that he felt the basic sense of fairness of most people enabled them to set aside prejudices when on a jury. He said, however, that it would be desirable for Native Americans to serve on juries and that "if I were an Indian defendant I would want to have one on the jury."[49]

Petersen testified that among cases which he had tried before a jury there had been instances where Indians were acquitted. (p. 102) James Krogsrud, a Bismarck attorney, conducted a study of the disposition of Federal criminal cases in North Dakota comparing Indian with non-Indian cases. The results of this study, compiled in table 4, show that the rate of jury acquital for non-Indian persons is nearly 8 percent higher than for Indians.

Gary Cardiff, civil rights officer for the North Dakota Social Services Board, was of the opinion that it is possible, "but damned difficult," to get an impartial jury for Native American defendants.[50] Burt Riskedahl, a Bismarck attorney, felt that it is not possible and said, "I'd be scared to death if I were an Indian and faced with jury proceedings."[51] Nodland stated that if he had 100 preemptory challenges and 3 days of individual questioning of prospective jurors he could get a fair jury.[52]

Nodland was unequivocal in his response to a question regarding prejudice against Indian people in the courtroom. He said:

> [W]hen I walk into the courtroom next time, I'll walk in knowing that there's a judge at the head of it and there's a jury sitting over at the side and there's prejudice in the courtroom. It's a fact that I deal with, and in the way I view it, and not a theory or a suspicion or a question mark. It is there. (p. 58)

Ralph LaPera, attorney for the United Tribes Technical Center, pointed out that there cannot be justice for Native Americans if the jury operates in a vacuum with no understanding of Indian culture. A major purpose of the United Tribes' curriculum development program, he said, is to enhance cross-cultural relationships and sensitivity that would make this possible.[53]

Nodland also felt that sensitivity and understanding of Indian ways was important if justice is to prevail. He illustrated what he meant with a specific example:

> I do recall a day about 10 years ago, sitting in a courtroom with a judge who is now deceased. I was just a spectator, and I walked out [of the courtroom] in a rage because of...what I felt was a condescending and patronizing and nonunderstanding, insensitive viewing of a person who was standing in front of the judge, who was scared, who was fatalistic, who was humble, and who was respectful; and the judge was viewing it just exactly the other way and the fellow was sentenced to the penitentiary. (p. 61)

TABLE 4
A Comparison of Indian and Non-Indian Federal Court Jury Acquittals in North Dakota, Jan. 1, 1972, to Feb. 20, 1976

	Total jury cases	No. of persons acquitted	No. of persons convicted
Non-Indian	35 (100%)	12 (34.2%)	23 (65.8%)
Indian	56 (100)	15 (26.8)	41 (73.2)
Totals	91 (100)	27 (100.0)	64 (100.0)

Source: James Krogsrud, United States District Court for the District of North Dakota, USA v. Russell Means and Thomas Richard Poor Bear (Affidavit: State of North Dakota, Burleigh County), Mar. 1, 1976.

The reality of the situation, he said, is that Indians are looked upon and treated differently from non-Indians by attorneys, judges, and jurors. He testified that "Indianness" is openly discussed outside of the courtroom and the effect that it will have upon the jury and upon the way the case must be handled. (pp. 61–63)

In preparation for the trial of Russell Means and Richard Poor Bear in 1976, Sidney L. Harring, a sociologist and an attorney, planned and directed a survey for the National Jury Project of New York City of those persons in the Southwestern Division of the U.S. District of North Dakota from whom a jury would be selected to try the defendants. The findings of the survey regarding racial prejudice were as follows:

> Racial prejudice against Indians in North Dakota is so pervasive that it is unlikely that an impartial jury could be empanelled. Over two-thirds (68.1 percent) of those surveyed thought that "A major reason for poverty among Indians is their lack of ambition." Similarly two-thirds (66.9 percent) felt that "Indians would be better off if they conformed to the American way of life." Nearly one-half (46.7 percent) agreed that "Indians carry a chip on their shoulder and tend to be violent." ...[A]lmost six out of ten (58 percent) disagree with the statement that "a major reason for poverty among Indians is that they have not been given the same opportunities as Whites." The combined effect of responses to these questions indicates that racial prejudice is even more pervasive: 85.5 percent of those interviewed responded in a racially prejudiced manner to at least one of the...three questions discussed above.[54]

Questions such as these, the survey stated, are accepted by social scientists as accurate measures of racism, and the answers reflect racially based hostility toward Indians.[55]

The court held that, on the basis of the results of this survey and other evidence, "substantial racial prejudice exists in the Southwestern Division of the District of North Dakota, and the Indian people are objects of that prejudice."[56] The court also held, however, that, though the fact of prejudice requires special attention to assure that Indian people receive fair trials, the assertion that Indian people cannot receive a fair trial in the Southwestern Division of North Dakota was not proved.[57] Change of venue outside of North Dakota was denied, but "to assure that the Defendants receive a fair trial" the place of trial was moved from the Southwestern Division in Bismarck to the Southeastern Division in Fargo.[58]

Notes to Chapter 4

1. N.D. Cent. Code §40–18–01.
2. N.D. Cent. Code §§40–18–19 and 15.
3. N.D. Cent. Code §33–01–08.
4. N.D. Cent. Code §27–18–02.
5. N.D. Cent. Code §§27–08–20 and 21.
6. N.D. Cent. Code §27–05–06.
7. N.D. Cent. Code §27–05–01 and 02.
8. 18 U.S.C. §1153.
9. United States v. Wade, 388 U.S. 218 (1966); Miranda v. Arizona, 384 U.S. 436 (1966); Coleman v. Alabama, 399 U.S. 1 (1970).
10. Gideon v. Wainwright, 372 U.S. 335 (1963).

11. Argersinger v. Hamlin, 407 U.S. 25 (1972).

12. Kent Higgins, Hearing Transcript, p. 80.

13. Ibid. Also, Kent Higgins, letter to Dr. Shirley Hill Witt, May 8, 1978.

14. Irvin Nodland, Hearing Transcript, p. 48.

15. Ibid., and Kent Higgins, Hearing Transcript, p. 86.

16. Kent Higgins, Hearing Transcript, p. 87.

17. John Olsen, State's attorney in Burleigh County, Hearing Transcript, p. 124.

18. Kent Higgins, Hearing Transcript, p. 87.

19. Irvin Nodland, Hearing Transcript, p. 66.

20. Kent Higgins, Hearing Transcript, p. 94.

21. Irvin Nodland, Hearing Transcript, p. 70.

22. Ibid., pp. 67–68.

23. Kent Higgins, letter to Dr. Shirley Hill Witt, May 8, 1978.

24. Irvin Nodland, telephone conversation with RMRO staff, Apr. 3, 1978.

25. John Olsen, State's attorney for Burleigh County, Hearing Transcript, p. 130.

26. Kent Higgins, Hearing Transcript, pp. 66–67.

27. Kent Higgins, letter to Dr. Shirley Hill Witt, May 8, 1978.

28. South Dakota Advisory Committee to the U.S. Commission on Civil Rights, *Liberty and Justice for All* (October 1977), p. 3.

29. Rule 11, N.D.R.Crim.P.

30. Rule 28b, N.D.R.Crim.P.

31. Interview with RMRO staff, Aug. 9, 1976.

32. Ibid.

33. Interview with RMRO staff in Bismarck, Aug. 11, 1976.

34. Interview with RMRO staff in Bismarck, Aug. 9, 1976.

35. Interview with RMRO staff in Bismarck, Oct. 27, 1976.

36. Interview with RMRO staff in Bismarck, Aug. 7, 1976.

37. Rule 46 (a)(1), N.D.R.Crim.P.

38. Dennis Schneider, interview with RMRO staff in Bismarck, Aug. 9, 1976; Ben Pulkrabeck, interview with RMRO staff in Bismarck, Aug. 9, 1976; and Kent Higgins, Hearing Transcript, p. 90.

39. Ben Pulkrabeck, telephone interview with RMRO staff, Apr. 14, 1978.

40. N.D. Cent. Code §27-09.1-02 and 05. Appendix A contains a detailed description of the jury selection process in North Dakota and Burleigh County, supplied to RMRO by D. J. Hanson, Fourth Judicial District court administrator, with a letter on Dec. 22, 1977.

41. Interview with RMRO staff in Bismarck, Aug. 9, 1976.

42. Irvin Nodland, interview with RMRO staff in Bismarck, July 13, 1976; and Richard Baer, interview with RMRO staff in Bismarck, Aug. 9, 1976.

43. Burt Riskedahl, interview with RMRO staff in Bismarck, Aug. 10, 1976; Ben Pulkrabeck, interview with RMRO staff in Bismarck, Aug. 9, 1976; and Albert Wolf, interview with RMRO staff in Bismarck, Aug. 11, 1976.

44. Thomas M. Disselhorst, United States District Court for the State of North Dakota, U.S. v. Thomas Richard Poor Bear and Russell Charles Means; C1–75–23 (Affidavit: State of North Dakota, Burleigh County), Dec. 17, 1975.

45. Ibid., pp. 3–6.

46. Ibid., pp. 6–7.

47. Ibid., p. 8.

48. Interview with RMRO staff in Bismarck, Aug. 9, 1976.

49. Interview with RMRO staff in Bismarck, July 14, 1976.

50. Interview with RMRO staff in Bismarck, Aug. 9, 1976.

51. Interview with RMRO staff in Bismarck, Aug. 10, 1976.

52. Interview with RMRO staff in Bismarck, July 13, 1976.

53. Interview with RMRO staff in Bismarck, May 24, 1976.

54. Sidney L. Harring, United States District Court for the District of North Dakota, U.S. v. Russell Charles Means and Thomas Richard Poor Bear; C1–75–23 (Affidavit: State of North Dakota, Burleigh County), December 1975.

55. Ibid.

56. Bruce M. Van Sickle, Judge, United States District Court for the District of North Dakota, U.S. v. Russell Charles Means and Thomas Richard Poor Bear; C1–75–23 (Order), Mar. 3, 1976.

57. Ibid.

58. Ibid.

4. Findings, Conclusions, and Recommendations

Based upon its investigation, the North Dakota Advisory Committee to the U.S. Commission on Civil Rights makes the following findings, conclusions, and recommendations.

Employment of Native Americans by Law Enforcement Agencies

Findings and Conclusions:

It is axiomatic that Indian officers, male and female, could contribute significantly to improved communication between the police and Native Americans and thus help to ensure that all persons receive equal protection under the law.

On the basis of their proportion in the general population and the North Dakota work force, Native Americans are underrepresented on the staffs of both the Burleigh County Sheriff's Office and the Bismarck City Police Department. Neither of these agencies nor the North Dakota Highway Patrol has a current affirmative action plan that is adequate to assure the recruitment of representative numbers of Indian personnel in the future.

The North Dakota Combined Law Enforcement Council fails to comply with the Law Enforcement Assistance Administration (LEAA) guidelines which state that this agency is responsible for ascertaining that adequate equal employment opportunity (EEO) programs are implemented by grant-receiving agencies who qualify.

Recommendations:

State and local law enforcement agencies should establish recruitment programs specifically designed to increase the number of male and female Native American law enforcement personnel. In their recruitment effort they should contact all Indian organizations in the State.[1] The North Dakota Combined Law Enforcement Council should conduct equal employment opportunity compliance reviews of the Bismarck City Police Department, the North Dakota Highway Patrol, and all other law enforcement agencies in North Dakota that are covered by LEAA guidelines. Those found to be in noncompliance with LEAA equal employment opportunity guidelines should be required to develop acceptable programs as a condition for the receipt of any further Federal funds. The North Dakota Combined Law Enforcement Council should send the results of its reviews, along with copies of the affirmative action plans of these agencies, to the North Dakota Advisory Committee to the United States Commission on Civil Rights.

Law Enforcement Officer's Standards

Findings and Conclusions:

There are no statewide uniform standards for entrance into police employment in North Dakota.

Recommendations:

The State legislature should set minimum standards for the employment of law enforcement officers in North Dakota.

Upgrading Law Enforcement Personnel

Findings and Conclusions:

The North Dakota Law Enforcement Training Center, operated by the North Dakota Highway Patrol (NDHP), offers free training for full-time, paid police officers in the State, but the 280 hours (7 weeks) of classroom training mandated by the State to be taken during the first year of employment are inadequate to assure adequately trained officers. The amount of training devoted to human relations and to understanding Native American culture, values, and socioeconomic patterns is also inadequate to rectify problems of communication and understanding that exist between law enforcement officers and Indian people.

Recommendations:

Beginning within the next 2 years the North Dakota Legislature should, as a permanent requirement, increase from 7 to 10 weeks the

classroom training required for North Dakota police officers within the first year of their employment. In addition, a minimum of 16 hours of training should be devoted to Native American history and culture, including value systems and socioeconomic patterns. The objectives of this training would be to provide better communication between law officers and Native Americans and to develop an understanding of how Indian offenders should be treated in order to ensure that their rights are understood and protected. In addition, all police officers should be required to receive annual inservice training similar to that now required by the NDHP, the Burleigh County Sheriff's Office, and the Bismarck City Police Department.

Alcohol and Crime

Findings and Conclusions:

Alcohol is a significant factor in a large proportion of arrests in North Dakota. Progress in the treatment and rehabilitation of alcoholics would reduce considerably the incidence of crime in the State. The Burleigh County detoxification center operated by the sheriff's office, though adequate for the present, should be replaced by facilities in a hospital or other medical institution.

Recommendation No. 1:

The Governor should appoint a special task force to assess the extent of alcoholism and its effect upon crime in the State. The task force should analyze the cost of the justice process for offenders who have committed alcohol-related crimes compared to the cost of the treatment and rehabilitation of alcoholics. On the basis of its assessment, the task force should prepare recommendations for a statewide alcoholism program in North Dakota and the allocation of sufficient funds for it.

Recommendation No. 2:

The North Dakota Supreme Court, in cooperation with the State bar association, should establish guidelines for a statewide system of alternative sentencing for alcoholics who commit crimes while under the influence of alcohol to provide these offenders with the option of treatment, rehabilitation, and community service in lieu of fines and incarceration.

Recommendation No. 3:

The Burleigh County Commissioners, in cooperation with the North Dakota Health Department, should direct the construction of adequate detoxification facilities at a medical institution.

Communication Problems in the Courts

Findings and Conclusions:

A problem of communication exists between Native Americans and North Dakota law enforcement officers, attorneys, and court officials that places Indians at a disadvantage in obtaining justice. This is largely due to a lack of cultural understanding between white and Indian cultures.

Recommendations:

The North Dakota Supreme Court should train and employ a male and a female Native American ombudsman versed in judicial procedures to assist Indian and other defendants in understanding their rights and the procedures used by law enforcement agencies and the courts throughout the State.

The Defense System

Findings and Conclusions:

The court-appointed defense attorney system in North Dakota places indigent defendants at a serious disadvantage. Inexperience, difficulties in communication, and inherent conflicts of interest or the part of some attorneys are detrimental to Native American defendants. The existence of a public defender's office in Burleigh and nine other counties from 1971 to 1976 helped to alleviate these problems during that period.

The extremely high number of guilty pleas involving indigent defendants in North Dakota, a prominent proportion of whom are Native Americans, also raises serious questions about adequate protection of the rights of defendants.

Recommendation No. 1:

The North Dakota Legislature should establish a statewide public defender system that will deliver quality indigent criminal defense services in accordance with appropriate national standards.[2]

Recommendation No. 2:

The North Dakota Supreme Court, in cooperation with the State bar association, should sponsor trial advocacy workshops to ensure that court-appointed attorneys gain sufficient trial experience to represent their clients competently. The State supreme court, in conjunction with the State bar association, should also develop guidelines and regulations to ensure that the rights of defendants are adequately understood and not violated by uninformed guilty pleas and plea-bargaining abuse.

The Bail System

Findings and Conclusions:

The North Dakota bail system works greatly to the disadvantage of indigent defendants. Cash bail and the requirement of property for surety often work special hardships upon Native Americans, who may not only be poor but also lack ties in the community in which they are arraigned, or who do not have property in fee simple upon which a lien could be placed.

Recommendation No. 1:

The North Dakota Legislature should enact a law requiring that every person charged with a noncapital offense be released on personal recognizance, unless the prosecutor can show sufficient evidence to the court that when ordered the defendant will not appear.

Recommendation No. 2:

In lieu of the 10 percent fee presently required by commercial agencies, each judicial circuit should accept bail amounting to 10 percent of the total bond, granting the remainder as a personal recognizance bond. This 10 percent would be refunded in cases where the defendant satisfies the appearance requirements of the court.

Jury Representation

Findings and Conclusions:

It is extremely rare for a Native American to serve on jury in North Dakota. Partly as a result of this lack of representation and partly as a result of prejudicial attitudes of potential jurors, it is very difficult to obtain an impartial jury for the trial of a Native American in the State.

Recommendation No. 1

The North Dakota Supreme Court should broaden the basis of the jury selection system beyond that of voter registration and driver's licenses lists to ensure the inclusion of a representative proportion of Native Americans on each jury panel.[3]

Recommendation No. 2:

The North Dakota Supreme Court, in cooperation with the State bar association, should direct a comprehensive statewide survey of the attitudes of potential jurors toward Indians. This study should be conducted by a competent, impartial organization from out of State. The results should be communicated to courts and attorneys throughout the State to alert them to the degree to which prejudice in any particular community would interfere with the selection of an impartial jury for trials involving Native American defendants.

Poverty and Crime

Findings and Conclusions:

Available statistics show that the level of Native American unemployment in North Dakota is much higher than that of white persons and that nearly half of the Indian families in the State live below the poverty level. Alleviation of certain inequities Native American encounter in the criminal justice system is directly related to solving the economic problems they face.

Recommendations:

The North Dakota Employment Security Bureau, in cooperation with the North Dakota Indian Affairs Commission, should conduct an extensive investigation of the extent and causes of male and female Indian unemployment and poverty both on and off the reservations. The results of the study should be made available to the Governor and to the State legislature with recommendations for steps that should be taken to eliminate the causes.

Notes to Chapter 4

1. The *North Dakota State Highway Department Affirmative Action Resource Directory*, Jan. 1, 1975, contains a partial list of Indian and Indian-related organizations in North Dakota and neighboring States.

2. Recommendations for such a system are contained in the National Center for Defense Management's report, *Systems Development Study of Indigent Defense Delivery Systems for the*

State of South Dakota, January 1977. Inquiries regarding the availability of this report should be addressed to the National Center for Defense Management, 2100 M St. N.W., Suite 601, Washington, D.C. 10037; or the South Dakota Law Enforcement Division, Department of Public Safety, Pierre, South Dakota 57501.

3. The Action Center for State Courts in Denver, Colorado, has been given a contract by the South Dakota Seventh Judicial Circuit to conduct a study aimed at improving the jury selection system. The final report is due in June 1978.

Overall Jury Selection Process Statewide as Prescribed in Chapter 27–09.1 (Uniform July Selection and Service Act) of the North Dakota Century Code

1. Master List
   a. Actual voters from county (pollbook lists)
   b. Driver license list
2. Master Jury Wheel
   a. Names or identification numbers of prospective jurors randomly selected from the master list.
   b. If total number of prospective jurors on the master list is 1,000 or less, the names or identifying numbers of all of them shall be placed in the master jury wheel.
   c. In all other cases, the number of prospective jurors to be placed in the master jury wheel shall be 1,000 plus not less than 1 percent of the total names on the master list.
3. Qualifying Jury Wheel (Random Selection from Master Jury Wheel of as many prospective jurors as the Court Directs)
   a. Clerk of district court sends jury qualification forms to prospective jurors in the qualified jury wheel.
   b. According to the responses from the jury qualification forms, court eliminates as prescribed by law disqualified jurors.
4. Jury Panels (Individual Panels of Qualified Jurors Randomly Selected from the Qualified Jury Wheel to be Summoned for Jury Duty)

Burleigh County Jury Selection Process

1. Master List
   a. Voters—In the 1976 general election there were 23,343 voters in Burleigh County.
   b. Licensed Drivers—List furnished from the North Dakota Highway Department contained 30,433 Burleigh County residents.

Comment: A recent study performed by Bird Engineering-Research Associates, Inc., showed that the Burleigh County drivers list contains about 96 percent of the population over 18. The list of actual voters (poll-books) contains about 65 percent. In addition, 47 percent of the drivers do not vote and only 21 percent of the voters do not drive.

2. Master Jury Wheel

Comment: The total number of names needed for the master jury wheel is determined by the Uniform Jury Selection Act, Section 27–09.1–06. There were a total of 54,776 names on the two lists (voters and drivers). Therefore, pursuant to statute, the master jury wheel should contain at least 1,548 names, which is 1,000 plus 1 percent. Prior to the selection of prospective jurors for the master jury wheel, some method to eliminate the duplicates must be performed so that citizens who are listed on both the voters and drivers list are not given a better opportunity to be selected. Most counties do this manually by comparing both lists and then eliminating the duplicates. Because of the large number of names that Burleigh County had (54,776) in 1976, an alternative method developed by Bird Research was used that eliminates the necessity of manually combining both lists. This method saved the county a considerable amount of money and ensured that an equal probability was maintained. The precise procedure is outlined in the attachment.

3. Qualified Jury Wheel
   a. Total number of names selected for the qualified jury wheel was 2,088.
   b. From the 2,088 prospective jurors, 1,487 were ultimately qualified after having responded to the qualification questionnaire....

4. Jury Panels

Comment: From the names of prospective jurors (1,487) individual jury panels are randomly selected. Most jury panels contain 30 to 40 jurors who are then summoned for jury duty. In Burleigh County most jury panels serve for approximately one month; however, they are required by law to report for service a total of only 10 days.

Burleigh County

A. The number of licensed drivers in Burleigh County is determined from the Highway Department Drivers License list. (In 1976 the list contained 30,433 names.)

B. The number of actual voters listed in the precinct poll books is determined. (In the 1976 general election there were 24,343 voters in Burleigh County.)

C. The percentage ratio of the total number of names on drivers list (30,433) to the total number of names on the precinct poll books (24,343) is determined. The ratio was 5 to 4 (for every 5 names on the drivers list there are approximately 4 names on the voters list.)

D. The total number of names needed for the master jury wheel is determined by the Uniform Jury Selection Act Section 27-09.1-06.. (There was a total of 54,776 names on the two lists. Therefore, pursuant to statute, the master jury wheel should contain at least 1,548 names which is 1,000 plus 1%.)

E. Using the 5 to 4 ratio (note C above), the number of names from each list, that will be necessary in order to obtain at least 1,548 unduplicated names, is selected by means of the key number method. For purposes of jury selection in 1976, Burleigh County predicted according to 1974 figures that approximately 21 percent of voter names would be unduplicated or defined as "good names." In other words, 79 percent of the names on the voter precinct poll books were assumed to be duplicated on the drivers license list.

Example:

There is no way to know for sure how many "good" unduplicated names that the voters lists selection will yield. Therefore, after actually preparing the voter list selection (1,440 names randomly selected from the 24,343 total names on the voters list), the percentage of unduplicated names may be higher or lower than what was estimated. In Burleigh County after using this method in 1976, there was actually 20% unduplicated names. Therefore, the actual yield was as follows:

Drivers License Names: 1,800

Voter List Names: 288 (20% of 1,440)

Total 2,088

F. Qualification questionnaires were sent to the 2,088 names on the master list and after the questionnaires were returned and processed, there remained a total of 1,487 names for the jury qualification wheel. There were 601 or 29% who were disqualified.

	Total Number of Names	Randomly Select key number method	Predicted Yield of Good Names	Actual Yield of Good Names
Drivers License	30,433	1,800	1,800 (Note 1)	1,800
Voters List	24,343	1,440	302 (Note 2)	288
Ratio	5/4	5/4	2,102	2,088

Note 1: The 1,800 names from the drivers list are defined as "good" unduplicated names.

Note 2: 1,440 names are randomly selected from the voters list and are then compared to the drivers list (1,440 voter names are compared to the 30,433 drivers names). Assuming according to 1974 figures that only 21 percent of the 1,440 voters names will be unduplicated on the drivers list, we can then predict that there will be approximately 302 unduplicated or good names. Therefore, using the 1,800 drivers list names and adding the 302 "good" voter list names, we predicted that we would end up with approximately 2,102 good or unduplicated names for the master jury wheel.

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